STATE OF MICHIGAN

COURT OF APPEALS

KEITH MUSSLEMAN, SR., KEITH MUSSLEMAN, JR., KEN MUSSLEMAN, KRIS MUSSLEMAN, and KEVIN MUSSLEMAN,

Plaintiffs-Appellants,

v

ALLSTATE LIFE INSURANCE CO.,

Defendant-Appellee.

UNPUBLISHED
July 23, 1999

No. 204015
Wayne Circuit Court
LC No. 96-609503 CK

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant in this breach of insurance contract action. We affirm.

Defendant brought its motion for summary disposition under MCR 2.116(C)(8) and (C)(10).[1] In granting the motion, the trial court referred to the insurance policy in order to interpret its language. Since the parties and the court went beyond the pleadings in arguing and deciding defendants' motion for summary disposition, we review the trial court's grant of defendants' motion pursuant to MCR 2.116(C)(10). *Espinoza v Thomas*, 189 Mich App 110, 114-115; 472 NW2d 16 (1991).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Weisman v US Blades, Inc*, 217 Mich App 565, 566; 552 NW2d 484 (1996). MCR 2.116(C)(10) permits summary disposition when, except as to the amount of damages, there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* at 567. Giving the benefit of doubt to the nonmovant, this Court must independently determine whether the movant would have been entitled to judgment as a matter of law. *Id.*

Plaintiffs first argue that the trial court erred in determining that there existed no genuine issue of material fact that the insurance policy issued to plaintiffs' decedent was not in effect at the time plaintiffs' decedent fell from the back of a stationary pick-up truck while unloading firewood from it, and that

plaintiffs are therefore not entitled to benefits for a loss arising out of an accident that occurred prior to the effective date of the policy. [2] We find that the trial court did not err.

> This Court interprets an insurance policy by first reviewing the policy language in an effort to effect the intent of the parties. If the language is clear and unambiguous, we apply the terms as written. If an ambiguity exists, it is resolved in favor of the insured. However, a policy is not rendered ambiguous simply because it omits the definition of a term. Absent a policy definition, we assign a term its commonly used meaning. [*Michigan Basic Prop Ins Ass'n v Wasarovich*, 214 Mich App 319, 322-323; 542 NW2d 367 (1995) (citations omitted).]

We find that the policy clearly states that the accident out of which the loss (i.e., death of an insured) arises must occur while the policy is in effect. Plaintiffs concede that the policy did not become effective until January 6, 1996. Therefore, we find that there exists no genuine issue of material fact that no coverage is available for any loss arising out of plaintiffs' decedent's fall from the pick-up truck since the fall occurred prior to the effective date of the policy. *Buczkowski v Allstate Ins Co*, 447 Mich 669, 685; 526 NW2d 589 (1994); *Wasarovich, supra*, 214 Mich App 322-323. Accordingly, the trial court properly granted summary disposition for defendant on plaintiffs' claim that additional benefits were payable under the policy because the loss arose out of an automobile accident.

Plaintiffs also argue that they are entitled to the payment of additional benefits under the insurance policy. We disagree.

Defendant paid plaintiff Keith Mussleman, Sr. $30,000 following plaintiffs' decedent's death pursuant to the "catch-all" provision of the insurance policy because plaintiffs' decedent died from the misadministration of myelogram dye during a medical procedure. Plaintiffs, however, argue that because the chain of events which ultimately lead to plaintiffs' decedent's death began when plaintiff's decedent fell off of the pick-up truck, they are entitled to the higher benefit amount delineated in the automobile accident coverage provision. We have already found that plaintiffs are not entitled to invoke the automobile accident coverage provision because the insurance policy had not yet become effective at the time plaintiffs' decedent allegedly fell out of the pick-up truck. The insurance policy, however, had become effective by the time plaintiffs' decedent died as a result of the misadministration of the myelogram dye. We therefore confine the following discussion to whether plaintiffs are entitled to additional benefits under the catch-all provision.

The catch-all provision states that:

> If an Insured Person dies as a result of an accident that is not covered in the previous sections, and not otherwise excluded from the Policy, the following benefit will be paid:

Primary Insured	Spouse	Each Child
$30,000	$30,000	$5,000

Plaintiff asserts that this provision, as written, means that, upon the death of the primary insured, defendant will pay *to* the primary insured $30,000, *to* the primary insured's spouse $30,000 and *to* each of the primary insured's children $5,000. Therefore, plaintiffs argue that they are at least entitled to an additional $50,000.

We find that the policy cannot logically be interpreted to mean that a benefit will be paid *to* those persons listed in the coverage provision, as one of those persons listed is the primary insured who, in this case, was plaintiffs' decedent. While a benefit may be paid on behalf of plaintiffs' decedent to her estate, a benefit obviously cannot be paid *to* plaintiffs' decedent after she dies. Since a benefit obviously cannot be paid *to* at least one of the persons listed in the coverage provision, it is logical to infer that the provision does not mean for a benefit to be paid *to* any of the other persons similarly listed. *Wasarovich*, 214 Mich App 322-323.

Furthermore, plaintiffs' interpretation of the coverage provision renders the policy's explanation of payments to beneficiaries superfluous. If plaintiffs' interpretation of the coverage provision language were correct, there would be no need to designate a beneficiary since, upon the death of any insured person, the benefits would be paid to those persons listed in the provision under which benefits were claimed, rather than to some separately identified person.

Moreover, the policy states that "accidental death benefits will be paid . . . [a]t your death, to your spouse, if living; *otherwise* equally to your living children." Assuming, *arguendo*, that plaintiffs are entitled to an additional $50,000, this language would mean that the entire amount be paid only to the primary insured's spouse – in this case, Keith Mussleman, Sr., as the language provides that benefits are paid to the children *only* if the spouse is not living. It is impossible to reconcile plaintiffs' interpretation that benefits are to be paid upon the death of the primary insured to the primary insured, to the primary insured's spouse, and to the primary insured's children with the language that states that benefits will be paid upon the primary insured's death to the primary insured's spouse *or* to the primary insured's children, if the spouse is not living. Thus, we find that the language of the insurance policy, when read as a whole, is not ambiguous, and demonstrates that plaintiffs' claim of entitlement to the payment of additional benefits is without merit. *Buczkowski, supra,* 447 Mich 685; *Wasarovich, supra*, 214 Mich App 322-323.

Affirmed.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White

[1] Defendant also brought its motion under MCR 2.116(C)(7), asserting that plaintiffs' claims were barred by defendant's earlier payment of benefits to plaintiff Keith Mussleman, Sr. The trial court denied this motion and defendant does not appeal the denial.

[2] We note that defendant disputes plaintiffs' contention that plaintiffs' decedent's alleged fall from the pick-up truck constitutes the accident leading to plaintiffs' decedent's death, but rather that plaintiffs'

decedent died as a result of the misadministration of myelogram dye, for which defendant paid plaintiff Keith Mussleman, Sr. a benefit of $30,000 pursuant to the insurance policy. However, for purposes of its motion for summary disposition, defendant accepts plaintiffs' allegation as true.